Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. — 78-594

CHARLES L. O'BRIEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles L. O'Brien, by and through his attorney, N. C. Deday LaRene, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of 29 USC § 186(a) (1) and (b) (1), filed February 8, 1978, and its Order denying his Petition for Rehearing, filed September 7, 1978.

OPINION BELOW

The two Orders of the Sixth Circuit Court of Appeals decided and filed February 8, 1978 (affirming Petitioner's conviction) and September 7, 1978 (denying petitioner's Petition for Rehearing of the February 8, 1978 Order) are reprinted in full herein as Appendices A and B hereto.

JURISDICTION

The Orders appealed from were filed February 8, 1978 and September 7, 1978. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Whether 29 USC § 186 is properly interpreted as a "strict liability" offense?

STATUTE INVOLVED

29 U.S.C. § 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> * * *

> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.
>
> * * *
>
> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT OF THE CASE

Petitioner was convicted of violating Title 29, Section 186 (a) (1) and (b) (1) of the United States Code.*

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* Section 186 (a) (1) and (b) (1), Title 29 of the United States Code provides in pertinent parts as follows:

> "§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.
>
> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; —
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

Specifically, Petitioner was convicted of willfully receiving and accepting a 1974 Chevrolet automobile, valued at approximately Three Thousand Dollars ($3,000.00) from Ritter Chevrolet. At trial, the Government contended that it was irrelevant whether or not the Petitioner intended to pay for the car; the statute required only a showing that the union representative received money or a thing of value with knowledge that (1) he was receiving the money or the thing of value; and (2) the donor was an employer of a union member whom he represented. Petitioner, on the other hand, contended that the statute required a general *mens rea* and therefore a necessary element of the offense was that he received the Chevrolet without intending to pay for it. In support of his theory, defense counsel requested the following jury instructions:

The word "willfully" means an act done with a bad purpose or without justifiable excuse, perversely or conduct marked by careless disregard whether or not one has the right to so act.

> *U.S. v Murdock*, 290 U.S. 389 (1933) Misdemeanor charge in failure to file a tax return.

In *U.S. v Bishop*, 93 S. Ct. 2007 (1973) the Court quoted the following language from *United States v Murdock, supra*, which remains the law:

> ". . . In view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of

> Congressional intent, assume that mere knowing and intentional default in payment of a tax, where there has been a willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such case to include *some element of evil motive* and want of justification in view of all of the financial circumstances of the taxpayer". (Emphasis added).

You are charged, ladies and gentlemen, that in order to find Mr. O'Brien guilty, you must be satisfied beyond a reasonable doubt that he knowingly and willfully did the acts charged in the Indictment.

Mere acts of suspicion are not enough to convict. There must be clear and convincing evidence to a moral certainty that he did the acts charged.

It is Mr. O'Brien's position (testimony) that at no time did he knowingly and willfully intend to receive a gift from Ritter Chevrolet, Inc., in the form of the 1974 Chevrolet Vega for his daughter, nor did he knowingly and willfully intend to accept services for the benefit of Janice Conn from Ritter Chevrolet, Inc.

Mr. O'Brien acknowledges that the Chevrolet Vega was delivered to his daughter, Josephine O'Brien, however, it is his (position) testimony

that his intent was to purchase the automobile. He maintains that because of Federal tax liens being filed against his assets and because of a poor credit rating with General Motors Acceptance Corporation (G.M.A.C.), that he was unable to obtain financing to pay for the 1974 Chevrolet Vega.

If you believe that Mr. O'Brien attempted to obtain financing on or about the time the Chevrolet Vega was delivered (December 23, 1973), then you should consider that attempt as evidence of his lack of willfulness to commit the act charged.

The Trial Court adopted the position of the Government and instructed as follows:

In short, if you find beyond a reasonable doubt that the car was given and the services were performed at no cost to the Defendant, it makes no difference whether the Defendant did not intend to do any wrong.

Petitioner appealed as of right to the Sixth Circuit Court of Appeals, which affirmed his conviction on February 7, 1978 (Appendix A). He duly filed a Motion for Rehearing thereon, which was denied on September 7, 1978 (Appendix B).

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW INTERPRET 29 USC § 186(a) (1) AND (b) (1) IN EFFECT AS A "STRICT LIABILITY" OFFENSE; THOSE SECTIONS IN FACT REQUIRE THAT A DEFENDANT WHO RECEIVES PROPERTY OR SOMETHING OF VALUE DO SO WITHOUT INTENDING TO PAY FOR IT; THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY AS REQUESTED BY THE PETITIONER, AND THE SIXTH CIRCUIT COURT OF APPEALS' AFFIRMANCE OF HIS RESULTING CONVICTION IN EFFECT EXTEND STRICT LIABILITY FOR HIS CRIMINAL VIOLATIONS TO A DEGREE HERETOFORE UNSANCTIONED IN THE FEDERAL CRIMINAL JURISPRUDENCE, AND ARE THEREFORE CLEARLY ERRONEOUS, AND BESPEAK A MISUNDERSTANDING OF THIS COURT'S DECISION IN UNITED STATES v. RYAN, 350 US 299 (1956), AND A NEED FOR GUIDANCE BY THIS COURT AS TO THE PLACE OF STRICT LIABILITY OFFENSES IN THE FEDERAL CRIMINAL JURISPRUDENCE, AND THE PROPER APPLICATION OF THE STATUTE INVOLVED HEREIN.

The clear effect of the Trial Court's instruction was to eliminate the requirement of a *mens rea* and reduce the statute to one of strict liability.

The requirement of a *mens rea* in order to attach criminal liability to a person's conduct is a well established principle of criminal law. In *Morissette v. United States*, 342 US 246 (1942), this Court reversed a defendant's conviction for conversion of spent bomb

casings from a United States Air Force base. At trial the defendant argued that he thought the bomb casings had been abandoned and therefore lacked criminal intent. The Trial Court, however, ruled that the defendant's intent was irrelevant; it was only necessary that the defendant took casings without permission and that the casings were on United States property. In reversing the conviction this Court stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.* A relation between some mental element and punishment for a *harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.* 342 U.S. at 250, 251 (footnotes omitted)

In *Morisette*, this Court did, however, note that certain offenses do not require a *mens rea*. Chief Justice Jackson labelled such offenses "public welfare offenses." 342 US at 255. The opinion traced the historical roots and rationale of the public welfare offenses but failed to develop a test by which it could be determined whether a statute was one of strict liability or one requiring *mens rea*. In fact, Mr. Justice Jackson noted that "[n]either this Court nor, so far as

we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." 342 US at 260. Mr. Justice Jackson's words ring as true today as they did when *Morisette* was decided. As of today the courts are left unguided as to when a crime includes a requirement that *mens rea* be shown, or can be considered one of strict liability. As one commentator stated, "The Court's failure to make the effort is a mark of inadequate performance in an increasingly important area of its adjudication." H. R. Packer, *Mens Rea and the Supreme Court*, 1962 Sup Ct Rev 107. The case presented by this Petition provides an appropriate setting for the Court to resolve the significant questions left open in this area.

The Court has yet to decide whether the statute in question, 29 USC § 186(a) (1) and (b) (1) requires a finding of *mens rea* before criminal liability can result. It is Petitioner's position that the statute does require a finding of *mens rea*, that to hold otherwise would be inconsistent with the statute's purpose, that the effect of the decisions below is to negate such a requirement, and that his conviction and its affirmance represent a manifest injustice.

The notion that the law punishes one's conduct only when that conduct is accompanied by an evil mind is a basic doctrine of American Jurisprudence. This is especially true where a defendant faces the possibility of imprisonment.* As Mr. Justice Vinson noted in

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* See R. Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stanford Law Review 730 (1969); Comments to Model Penal Code Tent. Draft No. 4 at 140 (1955).

Dennis v. United States, 341 US 494, 500 (1951), *mens rea* "is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence."

In the present case, the policy behind the statute in question is to prevent the possibility that the collective bargaining process will be influenced or corrupted through the existence of bribes or gifts to a union representative. *United States v. Kramer*, 355 F2d 891 (7th Cir 1966), *cert denied* 384 US 100 (1966). *See also Alvares v. Erickson*, 514 F2d 156 (9th Cir 1975); *United States v. Lanni*, 466 F2d 1102 (3d Cir 1972). Furthermore, the statute specifically exempts commodities purchased at the prevailing market price in the regular course of business. 29 USC § 186(c) (3).

At trial, petitioner contended that the automobile was purchased in the regular course of business but for one reason or another the payments were never made. When it became apparent that Petitioner would not be able to pay for the car, Petitioner suggested to Mr. Ritter, the owner of the automobile dealership, that he pick up the car and send him a bill for its rental. Mr. Ritter initially agreed to this arrangement but was subsequently instructed by the United States Attorney's Office to refrain from doing so.

If, in fact, Petitioner did in good faith intend to pay for the car, the evil which the statute seeks to prevent could never have occurred. Thus, in giving instructions which effectively denied the Petitioner the opportunity to present his theory, and to gain acquittal if his theory was believed by the jury, the Trial Judge sanctioned the expansion of the reach of the statute into an area where Congress did not apparently intend it to go.

This would seem to be an inevitable result of giving too broad currency to the notion of strict liability. Moreover, the facts of the case at bar make clear that to construe the statute here involved as being one of strict liability is improvident at best.

In dealing with analogous enactments, courts have required the findings of *mens rea* before a conviction can be sustained. In *United States v. Schaberg*, 263 F2d 369 (2d Cir 1966), *cert denied*, 385 US 919 (1966), the defendant was convicted of accepting money from an employer while being a union official, pursuant to 29 USC § 186. On appeal, the defendant objected to the Trial Court's instruction to the jury concerning *criminal intent*. The defendant relied heavily upon *United States v. Byrd*, 352 F2d 570 (2d Cir. 1955), however his conviction was affirmed and the Court of Appeals distinguished *Byrd, supra*, stating,

> "In that case, as in the present one, we indicated that enough of a definition of ordinary criminal intent could be winnowed out of what the Court said about the word 'knowingly' to survive the claim of plain error. But the Byrd case is distinguishable from the present case in that the Trial Court in Byrd, in effect, removed the element of intent from the case by reciting, toward the end of the charge, four essential elements the Court said constituted the offense, but it failed to include in the described, the element of criminal intent. The Court instructed the jury that if they found the four elements which the Court mentioned proven beyond a reasonable doubt, they had a duty to convict. This is what made the defect plain error in that

> case because the jury was instructed to find the defendant guilty solely on a finding of four elements which did not include criminal intent." 362 F2d at 374.

While the Court declined to reverse in *Schaberg*, it is noteworthy that the Court never questioned Appellant's contention that intent was an element of the offense, but held only that the issue of intent was sufficiently covered by the Trial Court's instruction. In the present case, however, the Trial Court can hardly be said to have adequately instructed on intent. In fact, the Court instructed that intent was irrelevant. Thus, the present case is controlled not by *Schaberg* but by *Byrd*. As in *Byrd*, the Trial Court in the present case listed what it considered the four essential elements of the offense, none of which included criminal intent. Later in the instructions the Trial Court specifically instructed that Petitioner's interest was irrelevant.

In *United States v. Holt*, 333 F2d 455 (2d Cir 1964), *cert denied* 380 US 942 (1965), the defendant was convicted of accepting a "thing of value" from an employer while being a union representative in violation of 29 USC § 186. On appeal the defendant argued that the trial court failed to instruct the jury that it must find that the defendant had knowledge that the thing of value came from an employer. While the Court of Appeals rejected the argument that the jury was not instructed as to knowledge, it recognized that knowledge was an essential element of the crime charged.

> The court properly instructed the jury that Holt's knowledge was an essential element in charging "did Mr. Holt actually know when receiving this thing of value both that it was a thing of value and that it was being conferred on behalf of an employing company or companies employing workers represented by him, Milton Holt?" 355 F2d at 455, 456.

Although Petitioner's case does not involve knowledge as in *Holt*, the rationale behind requiring knowledge as an element of the crime is the same as the rationale requiring intent as an element of the crime. If a defendant lacks knowledge that the "thing of value" came from an employer, he must lack intent to violate the statute. Similarly, if Petitioner intended to pay for the car, he also lacks the intent to violate the statute. Furthermore, the policy behind requiring knowledge as an element of the crime is the same as the policy requiring intent as an element of the crime. If a defendant lacks knowledge that the "thing of value" came from an employer, there is no risk that the collective bargaining process will be corrupted. Likewise, if Petitioner intended to pay for the car, there is no risk that he will feel obligated to negotiate a union contract favorable to the employer.

Petitioner concedes that 29 USC § 186 does not make conscious wrongdoing an element of the offense; it is unnecessary for the Government to prove that Petitioner accepted the gift for the purpose of influencing the collective bargaining process. Moreover, it is true that in *United States v. Ryan*, 350 US 299 (1956), relied on by both courts below, the statute creates an offense which is *malum prohibitum*, and requires no showing of willfulness, or malice, as those terms are ordinarily understood. Petitioner does contend, however, that it is necessary for the Government to prove that he intended to do the acts prohibited by the statute, whatever his

motive might have been. Furthermore, reliance by the courts below on *Ryan* is totally misplaced, inasmuch as they equate *malum prohibitum* with *strict liability*. It is not, and cannot be the law that by defining an offense *malum prohibitum* the Congress meant to dispense with the requirement that *some mens rea* be shown.

Thus, the Trial Court and Court of Appeals have departed from the long standing rule that a person's conduct should not be punished unless accompanied by the requisite *mens rea*. Whether 29 USC § 186 requires a showing of *mens rea*, and how it should be defined, is an issue of major conceptual importance to Federal law which has not been, but should be settled by this Court.

Finally, the decision of the Sixth Circuit is in marked conflict with its own prior decisions and the decisions of other Circuits in their treatment of the question of how to treat the presentation of the mental element of statutorily created offenses, where the defense involves a factual question of lack of criminal intent.

In *Smith v. United States*, 230 F2d 935 (6th Cir. 1956), the defendant was convicted of knowingly making false statements in applications for Federal Housing Administration (F.H.A.) loans. The defendant used the money he received to discharge existing obligations from prior home improvements. The defendant had been informed, by a bank employee, that F.H.A. loans could be used to discharge existing obligations although that information was incorrect.

The defendant's theory of the case, supported by uncontradicted evidence, was that he fully contemplated building a garage and installing a water heater but later feared doing so because of a possible lay-off from his job.

The Trial Court instructed the jury that if it believed the defendant knew the money would be used to discharge outstanding obligations, it was their duty to convict him. On appeal, the Sixth Circuit held that this portion of the instruction, ". . . ignored the element of criminal motive and guilty mind." 230 F2d at 938. (General Mens Rea).

In *United States v. Platt*, 435 F2d 789 (2d Cir 1970), the defendant was convicted of willfully failing to file personal income tax returns. In his defense, Platt contended that it was his understanding that the Internal Revenue Service had granted him extensions within which to file his returns; and that he relied upon his accountant to keep him in compliance with the law and therefore lacked the wilfulness required for conviction pursuant to the statute.

The issue here was thus presented as to whether the record contained evidence sufficient to entitle the defendant to an instruction on the defense of reliance. The Second Circuit stated:

> "The threshold required for this is not very high: A criminal defendant is entitled to have instructions relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." 435 F2d at 792.

The record below clearly reflects testimony, which if believed supports the position that O'Brien intended at all times to pay for the automobile. The record also reflects testimony which indicates that Mr. Ritter never intended that the vehicle be given to O'Brien free of charge. Accordingly, the record below presented a question for the jury which should have been preserved by the Trial Judge's instruction. The Trial Court's

instructions, however, effectively removed the question from the jury's consideration and can only be sustained if this Court is willing to hold that 29 USC § 186 defines a strict liability offense. Such a conclusion, of course, is manifestly improper.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the important questions herein presented with respect to the interpretation of 29 USC § 186, and the application of the doctrine of strict liability within Federal Criminal Law.

Respectfully submitted,

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Dated: October 5, 1978

APPENDIX A

ORDER OF SIXTH CIRCUIT COURT OF APPEALS
AFFIRMING PETITIONER'S CONVICTION

(United States Court of Appeals
For the Sixth Circuit)

No. 77-5206

(Filed February 8, 1978)

United States of America, Plaintiff-Appellee, v. Charles L. O'Brien, Defendant-Appellant.

Before: CELEBREZZE, PECK and LIVELY,
Circuit Judges.

Appellant, Charles L. O'Brien, was convicted of receiving property from an employer in an industry affecting commerce while being a union representative, in violation of 29 U.S.C. § 186. This cause was submitted to this Court on the briefs of counsel. The Court has considered the briefs and studied the record, and, being fully advised in the premises, is of the opinion that the district court did not err in refusing to give Appellant's proposed jury instruction. The jury instructions given properly reflected the fact that the offense is *malum prohibitum*. *United States v. Ryan*, 350 U.S. 299, 305 (1956). The proposed jury instruction misstated the law.

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

s John P. Hehman, Clerk

APPENDIX B

ORDER OF SIXTH CIRCUIT COURT OF APPEALS
DENYING PETITION FOR REHEARING

(United States Court of Appeals
For the Sixth Circuit)

No. 77-5206

(Filed September 7, 1978)

United States of America, Plaintiff-Appellee, v. Charles L. O'Brien, Defendant-Appellant.

Before: CELEBREZZE and LIVELY, Circuit Judges and PECK, Senior Circuit Judge.

Upon consideration of the appellant's petition for rehearing and it not appearing that the petition is well-taken,

It is ORDERED that the petition be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

opposition

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 571 F.2d 583.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1978. A petition for rehearing was denied on September 7, 1978. The petition for a writ of certiorari was filed on October 10, 1978, and is

therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly instructed the jury as to the element of willfulness under 29 U.S.C. 186(b)(1).

STATUTE INVOLVED

29 U.S.C. 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> * * * * *
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.
>
> * * * * *
>
> (c) The provisions of this section shall not be applicable * * * (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business;
>
> * * * * *

> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.
>
> * * * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner, a labor union representative, was convicted of receiving a car from an employer of union members, in violation of 29 U.S.C. 186(b)(1). He was fined $2,500 and sentenced to imprisonment for one year, with the provision that he will be released after serving one-third of that period pursuant to 18 U.S.C. 4205(f). The court of appeals affirmed (Pet. App. A).

1. The government's evidence showed that in 1973 and 1974 petitioner was a general organizer for the International Brotherhood of Teamsters (Tr. 20-21). He also acted as an administrator for Automotive Salesmen's Local 212 (Tr. 23, 171, 173-174). Members of that local included employees of Ritter Chevrolet of Detroit (Tr. 179-183).

In December 1973, a 1974 Chevrolet Vega worth almost $3,000 was delivered to petitioner upon the instructions of Charles Ritter, the president of Ritter Chevrolet (Tr. 60-61, 83-84, 135, 212-214, 372-373). Petitioner gave the car to his daughter (Tr. 39-40). He paid nothing for the vehicle (Tr. 84, 375, 387, 463-464).

The records at Ritter Chevrolet did not reflect the gift. They showed that a lease quotation for the car was prepared for petitioner in January 1974 but was never executed (Tr. 61). The following month the car's records were transferred to the company's demonstrator account (Tr. 61). The records were transferred twice more—to the company's leasing division in March 1974, and a month later to the shop rental inventory (Tr. 62, 67). Petitioner made no demonstrator, lease, or rental payments (Tr. 65-66). The car was repossessed in March 1976, after the investigation in this case had been initiated (Tr. 41-42, 377-378, 393).[1]

Before and after petitioner's receipt of the Chevrolet Vega, Local 212 had been negotiating a new labor contract with Ritter (Tr. 179, 210). The negotiations had stalled, however, on the issue of whether the company would have a closed union shop (Tr. 216, 231). In early March 1974, petitioner signed a contract for the union with Ritter that did not call for a closed shop. He had not participated in prior contract negotiations, and the union's negotiating

[1] Petitioner notes (Pet. 10) that during the investigation the prosecutor advised Ritter not to pick up the car (Tr. 288-289). At that time the grand jury had subpoenaed the title of the vehicle, and the Ritter dealership had been taken over by another company (Tr. 290-291). At that point the prosecutor did not know whether Ritter or the succeeding dealer had a right to the car (Tr. 291). The title was returned to Ritter when it was determined that he was entitled to that document (Tr. 291-292).

committee was not advised by petitioner of that event (Tr. 180-181, 221-222, 232-233).[2]

2. Petitioner's defense was that he had intended to purchase the vehicle but was unable to do so due to financial difficulties. According to petitioner's evidence, upon learning that he could not obtain financing for the purchase of the Vega, he decided to lease the vehicle. However, no lease payments were made (Tr. 375). Petitioner maintained that he had intended to pay for the car throughout and denied that he ever intended to receive the car as a gift (Tr. 463-464, 516).

Charles Ritter testified on petitioner's behalf that he did not intend to give the car to petitioner (Tr. 381). Nevertheless, Ritter acknowledged that petitioner was never billed for the vehicle (Tr. 387-388).

3. In the final charge, the court recited the underlying statute and explained the four elements of the offense, *i.e.*, receipt and acceptance of a 1974 Chevrolet automobile from Ritter Chevrolet, Inc.; employment of petitioner by the Teamsters on the date of receipt; representation by the Teamsters union of the employees of Ritter Chevrolet; and knowing and willful conduct on the part of the petitioner (Tr. 541-542). The court proceeded to explain the terms "willfully" and "knowingly" (Tr. 543-544):

[2] On the day before petitioner signed the contract, Local 212 merged with another local and thus ceased its existence (Tr. 312). In any event, the contract was not ratified (Tr. 233, 242).

> The word willfully means that the person knowingly and intentionally committed the act of which the offenses are constituted; and the word knowingly is defined thus:
>
> > An act is doing [sic] knowingly if done voluntarily or intentionally and not because of mistake or other innocent reason.
>
> The purpose of adding [the] word "knowingly" was to ensure that no one would be convicted because of an act done because of mistake or accident or other innocent reason.

Then, the court charged that the offense was committed even if the jury concluded that petitioner intended no wrongdoing (Tr. 544):

> The statute under which the Defendant is charged does not make conscious wrongdoing a necessary element. It is a criminal provision which outlaws all payments with exceptions not here involved between an employer and a union representative. In short, if you find beyond a reasonable doubt that the car was given * * * at no cost to the Defendant, it makes no difference whether the Defendant did not intend to do any wrong.

Petitioner's counsel objected to the charge on the ground that the jury should have been instructed that intent to receive the car free of charge is an essential element of the offense. The trial judge declined to further instruct the jury (Tr. 552-560).

ARGUMENT

Petitioner's sole argument is that a required element of an offense under Section 186 is the recipient's intent not to pay for an item received from an employer and that the trial court improperly refused to so instruct the jury. In *United States* v. *Ryan*, 350 U.S. 299, 305 (1956), however, this Court construed Section 186 and found it to be "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." So long as the statutory elements of the offense are present, therefore, no inquiry need be held to determine whether an accused in fact entertained a corrupt or an innocent purpose. It is enough that he knowingly and willfully received the thing of value without paying for it, as the trial judge instructed the jury. The courts of appeals have uniformly rejected attempts by defendants under the act to engraft a corrupt purpose element onto the offense. *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United States* v. *Ricciardi*, 357 F.2d 91, 99-100 (2d Cir.), cert. denied, 384 U.S. 942 (1966); see *United States* v. *Keegan*, 331 F.2d 257, 261-262 (7th Cir.), cert. denied, 379 U.S. 828 (1964).

Petitioner argues that the statute should be narrowly read to exclude those who violate its terms but whose intent is to pay eventually. As mentioned, however, a narrow construction of the statute was rejected in *United States* v. *Ryan*, where the defendant contended that he was not a union "representative" within the meaning of the act because he was

not the exclusive bargaining representative. This Court refused to give the term so "technical" a meaning, observing that to do so would defeat the purpose of Congress to outlaw all payments from an employer to a union representative, with only limited and express exceptions. 350 U.S. at 301, 304, 305. Regardless of whether the union representative intends to pay for the item in question upon receipt, the likelihood of a substantial conflict of interest remains when he in fact does not do so. Elimination of such potential risks of conflict of interest is the reason that Congress banned all such transactions save those expressly stated as exceptions. See *United States* v. *Lanni, supra*, 466 F.2d at 1104-1105.[3]

Petitioner errs in asserting (Pet. 11-12) that the decision of the court below is contrary to *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965). *Byrd* involved the prosecution of an Internal Revenue Service auditor charged with illegally accepting a fee. The conviction was reversed because criminal intent, an element of the offense, was completely omitted in the instructions to the jury. 352 F.2d at 573-574. Here no element was missing in the closing charge. The jury was fully instructed on the element of willfulness, which was all that the statute required. See *United States* v. *Schabert*, 362 F.2d 369, 374 (2d Cir.), cert. denied, 385 U.S. 919 (1966).

[3] One exception is for transactions in the ordinary course of business. 29 U.S.C. 186(c)(3). Petitioner does not contend, however, that his receipt of the Vega was in the ordinary course of business.

Similarly, petitioner's reliance (Pet. 14-15) on *Smith* v. *United States*, 230 F.2d 935 (6th Cir. 1956), is misplaced. There the defendant, charged with making false statements in applications for certain loans, presented evidence that the statements at issue were not knowingly false. The court of appeals in *Smith* held that the district court erroneously failed to instruct as to lack of knowledge under the theory of the defense. In the present case, the jury was adequately instructed as to willfulness and knowledge. As we have shown, intent to pay for the thing of value was not a valid defense under the circumstances here. The basis for reversal in *Smith*, *i.e.*, the failure to instruct on a valid theory of defense, is thus not present in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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